Virgin Records America, Inc v. Thomas Doc. 282

IN THE UNITED STATES OF DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

CAPITOL RECORDS, INC., *et al.*,

Plaintiffs,

vs.

JAMMIE THOMAS,

Defendant.

Case No.: 06cv1497-MJD/RLE

PLAINTIFFS' STATEMENT OF THE CASE

Pursuant to the Court's Third Amended Date Certain Trial Notice (Doc. No. 256, ¶ 1a), Plaintiffs respectfully submit their statement of the case.

BACKGROUND

Plaintiffs bring this action for infringement of their copyrighted sound recordings under the Copyright Act, 17 U.S.C. §§ 101, 106, 501-505. Plaintiffs are recording companies that own or control exclusive rights to copyrights in sound recordings, including specifically the twenty-four (24) copyrighted sound recordings identified in Amended Exhibit A and in Amended Schedule 1 attached hereto as Exhibit 1 (the "Sound Recordings").[1] Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and exponentially expanding problem of digital piracy over the Internet. Today, copyright infringers use various online media distribution systems to download (reproduce) and unlawfully disseminate (distribute) to others billions of perfect digital copies of Plaintiffs' copyrighted sound recordings each month. The United States Supreme Court has characterized the magnitude of online piracy as "infringement on a gigantic scale." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 940

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[1] The 24 copyrighted Sound Recordings are a small subset of the sound recordings identified on Exhibit B to Plaintiffs' Complaint.

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(2005). As a direct result of piracy over peer-to-peer networks, Plaintiffs have sustained and continue to sustain financial losses.

On February 21, 2005, MediaSentry, a third party retained by Plaintiffs, detected an individual using Internet Protocol ("IP") address 24.179.199.117 engaged in the infringement of Plaintiffs' copyrighted sound recordings. This individual was distributing 1,702 digital audio files—many of them Plaintiffs' copyrighted sound recordings—from the KaZaA "shared" folder on her computer. This individual was distributing these audio files for free over the Internet under the username "tereastarr@KaZaA" to millions of other KaZaA users. MediaSentry determined that Charter Communications, Inc. was the Internet Service Provider associated with IP address 24.179.199.117. Plaintiffs then filed a "Doe" lawsuit and obtained an order for expedited discovery to determine the identity of the infringer. In response to Plaintiffs' Rule 45 subpoena, Charter Communications identified Defendant Jammie Thomas as the subscriber responsible for IP address 24.179.199.117 on February 21, 2005.

The names of each of the 1,702 digital audio files that were being distributed from Defendant's computer are listed in Exhibit B to the Complaint.[2] The 24 Sound Recordings at issue constitute a sample of the copyrighted works that Defendant infringed for which Plaintiffs are asserting their rights. Based on these and other facts, Plaintiffs will prove that Defendant is liable for the direct infringement of Plaintiffs' copyrights because she downloaded and distributed the Sound Recordings over the Internet without Plaintiffs' authorization. For all of these reasons, Plaintiffs seek an award of statutory damages under 17 U.S.C. § 504, a permanent injunction as prayed for in the Complaint under 17 U.S.C. § 502, and costs of suit under 17 U.S.C. § 505.

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[2] Exhibit B to the Complaint is a copy of the shared folder on Defendant's computer that contained the 1,702 digital audio files that Defendant was distributing to millions of users on a peer-to-peer network at the time Plaintiffs' investigator caught her doing so.

STATEMENT OF FACTS

Plaintiffs will prove the following facts at trial:

1. Plaintiffs are the owners and/or exclusive licensees of the 24 Sound Recordings at issue.

2. Plaintiffs' copyright registrations for each of the Sound Recordings was effective, in accordance with the Copyright Act, on the date of registration, as indicated on the Certificates of Registration (Plaintiffs' Trial Exhibit 3), which, in each case, was prior to the date Defendant infringed them.

3. Plaintiffs placed copyright notices on each of the compact disc containers and on the surface of each of the compact discs containing the Sound Recordings, as provided in section 402 of the Copyright Act, and Defendant had access to such notices.

4. Plaintiffs did not authorize Defendant to download or distribute any of the Sound Recordings.

5. On February 21, 2005, at approximately 11:09 p.m. EST, MediaSentry discovered a user at IP address 24.179.199.117 distributing 1,702 digital audio files, including Plaintiffs' Sound Recordings at issue, using the KaZaA file-sharing program.

6. The KaZaA username for the individual at IP address 24.179.199.117 on February 21, 2005 was "tereastarr@KaZaA."

7. The "tereastarr" username has been Defendant's Internet username for multiple purposes for many years.

8. The Internet service provider ("ISP") for the computer with IP address 24.179.199.117 on February 21, 2005 was Charter Communications, Inc. ("Charter").

9. Information provided by Charter in response to a Rule 45 subpoena identified Defendant, Jammie Thomas, as the subscriber of record and person responsible for IP address 24.179.199.117 on February 21, 2005 at approximately 11:09 p.m. EST.

10. Defendant used the KaZaA file-sharing program to download Plaintiffs' copyrighted Sound Recordings to her computer and to distribute Plaintiffs' copyrighted Sound Recordings from the KaZaA shared folder on her computer to the public through her Internet account with Charter.

11. Defendant knew such conduct was unlawful, and acted willfully in violating Plaintiffs' copyrights.

12. Defendant also intentionally concealed her infringement and tried to escape responsibility for her actions by fabricating a clean hard drive to produce to Plaintiffs for inspection.

ARGUMENT

A. Defendant Is Liable For Infringing Plaintiffs' Copyrighted Sound Recordings.

To establish that Defendant directly infringed Plaintiffs' copyrights, Plaintiffs must prove (1) that they own the copyrights in the Sound Recordings and (2) unauthorized copying or distributing by Defendant. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (U.S. 1991); *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 962-63 (8th Cir. 2005); 4 M. & D. Nimmer, NIMMER ON COPYRIGHT § 13.01, at 13-5 & n.4 (2002) ("Nimmer") ("[T]here are only two elements necessary to the Plaintiffs' case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant."). Copyright infringement is a strict liability offense, and Plaintiffs need not demonstrate Defendant's intent to infringe, or even knowledge of infringement, in order to prove copyright infringement. *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 829 (8th Cir. 1992)

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(describing liability for copyright infringement as absolute because "[t]he defendant's intent is simply not relevant: The defendant is liable for 'innocent' or 'accidental' infringements").

The Copyright Act grants the copyright owner of a sound recording the exclusive right to, among other things, "reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. § 106(1). The act of downloading copyrighted sound recordings on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive reproduction right. *Grokster*, 545 U.S. at 923, 929; *BMG Music v. Gonzalez*, 430 F.3d 888, 893 (7th Cir. 2005); *In Re: Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *UMG Recordings v. Mp3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000); 2 *Nimmer* § 8.08[A][1], at 8-115.

The Copyright Act also grants the copyright owner of a sound recording the exclusive right to "distribute copies or phonorecords of the copyrighted work to the public." 17 U.S.C. § 106(3). The act of distributing copyrighted sound recordings to other users on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive distribution right. *Grokster*, 545 U.S. at 923, 929; *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007); *Napster*, 239 F.3d at 1014; *Aimster*, 334 F.3d at 647; *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401 (S.D.N.Y. 2002); *Atlantic Recording Corp. v. Anderson*, 2008 WL 2316551, at *7 (S.D. Tex. Mar. 12, 2008). A distribution to MediaSentry of a copyrighted sound recording owned or controlled by Plaintiffs violates Plaintiffs' right of exclusive distribution. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216 (D. Minn. 2008) (holding that "distribution to MediaSentry can form the basis of an infringement claim . . . Eighth Circuit precedent clearly approves of the use of investigators by copyright owners."); *see also Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994) ("the copies made by [the defendant] at the request of the investigator were copyright violations"). An inference that a distribution actually took place may be made where a defendant has completed all the necessary steps for the distribution of copyrighted sound recordings to other users on a peer-to-peer network, without license from the copyright owners. *See London-Sire Records, Inc. v. Doe I*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 984 (D. Ariz. 2008). In this case, Defendant completed all of the steps necessary for the distribution of Plaintiffs' copyrighted Sound Recordings to millions of other users on the KaAaA network.

As discussed in Plaintiffs' Supplemental Brief Pursuant to May 15, 2008 Order and Plaintiffs' Reply Brief Pursuant to May 15, 2008 Order (Doc. Nos. 180, 183), the act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, also violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown. Plaintiffs acknowledge that the Court disagrees with this interpretation of the law and provide this argument and reference to supporting law to preserve their rights related to this issue.

In this case, Plaintiffs will establish that they own or control exclusive rights to, and hold valid copyright registrations for, each of the 24 Sound Recordings at issue. Plaintiffs will also prove that Defendant used the KaZaA file sharing program on her computer to download and distribute Plaintiffs' Sound Recordings through her Charter Internet account from and to other users of the KaZaA file sharing network. Plaintiffs will further prove that Defendant's infringement was willful, and that Defendant attempted to conceal her infringement and escape liability by fabricating a clean hard drive before producing it to Plaintiffs for inspection.

Defendant is, therefore, liable for the infringement of Plaintiffs' copyrights, and Plaintiffs are entitled to statutory damages, injunctive relief, and costs of suit.

B. Plaintiffs Are Entitled To An Award Of Statutory Damages.

The Copyright Act provides that, once copyright infringement has been established:

> [T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally.

17 U.S.C. § 504(c)(1); *see also Fitzgerald Publ'g Co., Inc. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1114 (2d Cir. 1986) (noting that, upon proof of infringement, a copyright "owner may elect to recover – instead of actual damages and profits – statutory damages under § 504(c)(1) for those works whose copyrights were registered at the time the infringement occurred"). The appropriate statutory damages for non-willful infringement range from a minimum of $750 per work to a maximum of $30,000 per work. *See* 17 U.S.C. § 504(c)(1). In the case of willful infringement, like this one, "the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000" per infringement. *See* 17 U.S.C. § 504(c)(2).

In determining whether an infringer's conduct was willful, the standard is "whether the defendant had knowledge that its conduct represented infringement or perhaps recklessly disregarded that possibility." *Gregerson v. Vilana Fin., Inc.*, 2008 U.S. Dist. LEXIS 11727, at *16 (D. Minn. Feb. 15, 2008); *see also Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (citing 3 *Nimmer* § 14.04[B], at 14-40.2-.3 (1989)); *Hamil Am., Inc. v. GFI, Inc.*, 193 F.3d 92, 107 (2d Cir. 1999). A plaintiff can prove willfulness "by proffering circumstantial evidence that gives rise to an inference of willful conduct." *Gregerson*, 2008 U.S. Dist. LEXIS 11727, at *16. Knowledge may be either actual or constructive. *GMA Accessories,* *Inc. v. Olivia Miller, Inc.*, 139 Fed. Appx. 301, 303 (2d Cir. 2005); *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 264 (2d Cir. 2005) ("even in the absence of evidence establishing the infringer's actual knowledge of infringement, a plaintiff can still prove willfulness by proferring [sic] circumstantial evidence that gives rise to an inference of willful conduct."). Importantly, knowledge can also be established by intentional concealment of the infringement. *See RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 859-60 (S.D.N.Y. 1984); *Johnson v. Salomon*, 1977 U.S. Dist. LEXIS 15735, at *48, *59 (D. Minn. May 25, 1977). Reckless disregard of the copyright holder's rights can be inferred from continuous infringement, a past pattern of infringement, continuing infringement despite warnings, or other circumstances. *See RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988) ("reckless disregard of the copyright holder's rights (rather than actual knowledge of infringement) suffices to warrant award of the enhanced damages"); 4-14 *Nimmer* § 14.04[B][3][a]; *MJ Int'l, Inc. v. Hwangpo*, 2002 U.S. Dist. LEXIS 11079, at *7-8 (D. Neb. June 6, 2002) (*citing RCA/Ariola International, Inc.*, 845 F.2d at 779); *Microsoft Corp. v. Evans*, 2007 U.S. Dist. LEXIS 77088, at *15, 18-19 (E.D. Cal. Oct. 16, 2007).

Plaintiffs do not need to prove any actual damages to be entitled to an award of statutory damages. Plaintiffs may elect statutory damages regardless of the adequacy of the evidence offered as to their actual damages and the amount of Defendant's profits. *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233 (1952) ("Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within [the] statutory limits to sanction and vindicate the statutory policy" of discouraging infringement); *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996) (citing *Woolworth*, 344 U.S. at 233); *Gregerson*, 2008 U.S. Dist. LEXIS 11727, at *16 (a plaintiff may recover statutory damages whether or not there is any evidence of actual damages); *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) ("Because awards of statutory damages serve both compensatory and punitive purposes, a plaintiff may recover statutory damages whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant, in order to sanction and vindicate the statutory policy of discouraging infringement"); *Peer Int'l Corp.*, 909 F.2d at 1336; *Columbia Pictures Television, Inc. v. Krypton Broad.*, 259 F.3d 1186, 1194 (9th Cir. 2001) (citing *Nimmer* § 14.04[A]); *Aimster*, 334 F.3d at 649 ("a copyright owner who can prove infringement need not show that the infringement caused him a financial loss"); *Bly v. Banbury Books, Inc.*, 638 F. Supp. 983, 987 (E.D. Pa. 1986) (requiring no proof of actual damages because such proof "would contravene the purpose of the statutory damages provision"); *Nimmer* § 14.04[A] (an award of statutory damages does not require evidence of actual damages). Congress gave copyright owners the choice to elect to receive statutory damages "precisely because of the difficulties inherent in proving actual damages and profits." *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 462 (S.D.N.Y. 2000), *aff'd in relevant part, rev'd on other grounds*, 262 F.3d 101 (2d Cir. 2001).

Plaintiffs will establish Defendant's liability for copyright infringement and ask the jury to award statutory damages. Plaintiffs will also establish that Defendant's infringement was willful and will request an increase in the award of statutory damages because of Defendant's willful conduct.

C. Plaintiffs Are Entitled To Entry Of A Permanent Injunction.

The Copyright Act provides, "Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a); *see also Pac. & S. Co. v. Duncan,* 744 F.2d 1490, 1499 n.17 (11th Cir. 1984). Injunctions are routinely issued pursuant to the mandate of Section 502 because "the public interest is the interest in upholding copyright protections." *Autoskill Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1499 (10th Cir. 1993); *see also Atari Inc. v. North Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 620 (7th Cir. 1982) (injunction "necessary to preserve the integrity of the copyright laws which seek to encourage individual efforts and creativity by granting valuable enforceable right"); *Morley Music Co. v. Café Cont'l, Inc.*, 777 F. Supp. 1579, 1583 (S.D. Fla. 1991) ("A Plaintiff is entitled to a permanent injunction in a copyright action when liability has been established and where there is a threat of continuing violations.").

Once copyright infringement is established, irreparable injury is presumed. *See, e.g., Atari*, 672 F.2d at 620; *In re Aimster Copyright Litigation*, 252 F. Supp. 2d 634, 662 (N.D. Ill 2002); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 925 (N.D. Cal. 2001) (*citing Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1109 (9th Cir. 1998)). Once irreparable injury is presumed, injunctive relief is appropriate because damages alone are not an adequate remedy. *See Napster*, 239 F.3d at 1027 (holding that an injunction "is not only warranted but required"); *Arista Records, Inc. v. Beker Enters., Inc.*, 298 F. Supp. 2d 1310, 1314 (S.D. Fla. 2003) (noting that injunctions are "regularly issued" because of the strong public interest in copyright protections); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392-93 (6th Cir. 1996) ("The weight of authority supports the extension of injunctive relief to future works.").[3]

Plaintiffs seek injunctive relief in the form requested in their Complaint.

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[3] Additionally, pursuant to the equitable powers provided under 17 U.S.C. § 503(b) (2000), this Court has the power to order the destruction of all infringing copies in Defendant's possession as part of a final order or decree. *See Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992).

D. Plaintiffs Are Entitled To Costs Of Suit, Including Attorneys Fees.

Finally, Section 505 of the Copyright Act expressly authorizes recovery of "full costs," because an award of costs would "(1) deter future copyright infringement; (2) ensure that all holders of copyrights which have been infringed will have equal access to the court to protect their works; and (3) penalize the losing party and compensate the prevailing party." *A&N Music Corp. v. Venezia,* 733 F. Supp. 955, 959 (E.D. Pa.. 1990). Section 505 also allows the Court to award "a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505; *Fogerty v. Fantasy, Inc.*, 510 US 517 (1994).

Plaintiffs believe they will prevail in this case, and, if they do so prevail, they intend to seek attorney fees and costs under 17 U.S.C. § 505.

Respectfully submitted this 1st day of June 2009.

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